ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

No. 02-8286

Supreme Court, U.S.
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DELMA BANKS, Jr.,
Petitioner,

-vs-

JANIE COCKRELL, Director,
Respondent.

ORIGINAL

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

An Execution Date Is Set For March 12, 2003

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CAPITAL CASE

QUESTIONS PRESENTED

In this Texas capital case, the Fifth Circuit (in an unpublished order) overturned the district court's issuance of *habeas corpus* relief as to Petitioner Delma Banks's sentence. Banks contends that the Court of Appeals reached this result only by misapplying and misinterpreting well-established precedents of this Court regarding, *inter alia*, prosecutorial suppression of material evidence favorable to a defendant, prosecutorial misuse of peremptory challenges to exclude African Americans from Banks' petit jury, and trial counsel's ineffective assistance of counsel. Specifically, Banks seeks review by this Court of the following questions:

1. Did the Fifth Circuit commit legal error in rejecting Banks' *Brady* claim — that the prosecution suppressed material witness impeachment evidence that prejudiced him in the penalty phase of his trial — on the grounds that:

(a) the evidence supporting the claim was procedurally defaulted, notwithstanding the fact that, like in *Strickler v. Greene*, 527 U.S. 263 (1999), there was no reasonable basis for concluding that counsel for Banks could have discovered the suppressed evidence prior to or during the trial or state post-conviction proceedings; and

(b) the suppressed evidence was immaterial to Banks' death sentence, where the panel neglected to consider that the trial prosecutors viewed the evidence to be of "utmost importance" to showing a capital sentence was appropriate?

2. Did the Fifth Circuit act contrary to *Strickland v. Washington*, 466 U.S. 668 (1984) and *Williams v. Taylor*, 529 U.S. 362 (2000), where it weighed each item of mitigating evidence separately and concluded that no single category would have brought a different result at sentencing without weighing the impact of the evidence collectively?

3. Did the Fifth Circuit act contrary to *Harris v. Nelson*, 394 U.S. 286 (1969) and *Withrow v. Williams*, 507 U.S. 680 (1993) in holding that Fed. R. Civ. P. 15(b) does not apply to *habeas* proceedings because "evidentiary hearings" in those proceedings are not similar to civil "trials"?

4. Did the Fifth Circuit err in refusing to consider Banks' jury discrimination claim — virtually identical to one this Court is considering in *Miller-El v. Cockrell* (No. 01-7662) — based upon its conclusions that:

(a) the state courts' rejection of that claim rested upon an adequate and independent state ground; and that

(b) there was inadequate prejudice to Mr. Banks's interests to excuse his counsel's failing to present, at trial, direct and statistical evidence of the prosecution's consistent policy of using peremptory challenges to keep African Americans off felony juries?

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DELMA BANKS, Jr.,
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On Petition for Writ of Certiorari to the
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PETITION FOR WRIT OF CERTIORARI

Petitioner Delma Banks Jr., respectfully requests that this Court issue a writ of certiorari to review a decision of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit, issued on August 20, 2002, is unpublished and is attached as App. A. The unreported decision of the United States District Court, issued on August 18, 2000, is attached as App. B. The report and recommendation of the Magistrate Judge, also unpublished, issued on May 11, 2000, is attached as App. C. The unreported decision of the Texas Court of Criminal Appeals, issued on January10, 1996, is attached as App. D. The unreported Findings of Fact and Conclusions of Law entered on July 22, 1993 by the 102nd Judicial District Court, Bowie County, are attached as App. E. The unreported Order of the Texas Court of Criminal Appeals, entered on March 3, 1993, is attached

as App. F. The unpublished Findings of Fact and Conclusions of Law, entered on February 22, 1993 by the 102nd Judicial District Court, Bowie County, are attached as App. G. The Order of the United States Court of Appeals for the Fifth Circuit denying rehearing on September 23, 2002, is attached as App. H. The October 2, 2002 Order of the 102nd Judicial District Court, Bowie County, setting Mr. Banks' execution for March 12, 2003 is attached as App. I.

JURISDICTION

The Court of Appeals' judgment was entered on August 20, 2002. A timely petition for rehearing was denied on September 23, 2002. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth, Eighth and Fourteenth Amendments to the United States Constitution as well as the provision of the federal habeas statute concerning issuance of certificates of appealability. Those provisions are supplied in App. J.

STATEMENT OF THE CASE

1. State Trial Court Proceedings

On Monday, April 14, 1980, the body of sixteen-year-old Richard Whitehead was found in a Nash, Texas park at roughly 10:00 a.m. Tr. Ex. C-2 at 1. An initial investigation established that the last time he had been seen alive was the previous Friday evening, April 11. *Id.* at 2. Two female acquaintances of Whitehead told police he had been with a 21- year old African American male, later identified as Delma Banks, Jr. An individual near the park reported that he was awakened by loud noises that could have been gunshots at roughly 4:00 a.m. on Saturday, April 12. *Id.* at 5.

Police surveillance of Banks during the next week yielded no incriminating evidence. *Id.* at 6. Deputy Sheriff Huff, the lead investigator, thereafter contacted police informant Robert Farr and told him he would pay him $200 if Farr could obtain Banks' gun. Tr. at 87-89; Tr. Ex. B-01 at ¶ 7. Farr agreed and told Banks he needed a pistol to commit robberies. Farr persisted in the face of Banks' refusal until Banks finally agreed. Tr. Ex. B-01 at ¶ 8. Banks said they would have to go to Dallas to get a gun. *Id.* On April 23, Farr, Banks and Marcus Jefferson drove to Dallas after Farr tipped off police about the trip. *Id.* at ¶¶ 9-10; Tr. Ex. C-2 at 6. Bowie and Dallas County authorities monitored the trip, observed the car stop at a south Dallas home, and witnessed Banks go to the front door. Tr. Ex. C-2 at 6. After a short time, Banks returned to the car and drove away. *Id.* Within minutes, officers stopped the car. Tr. Ex. B-01 at ¶ 10. All three men were taken into custody and a .22 caliber pistol was seized. Tr. Ex. C-2 at 7. The next morning, Farr and Jefferson were released.

Deputy Huff immediately recognized that the seized .22 was not the murder weapon. *Id.* Before dawn, he and other officers returned to the south Dallas home, entered and confronted the occupant, Charles Cook. Tr. Ex. C-2 at 7. They spoke to Cook for forty-five minutes, informed him that Banks was wanted for Whitehead's murder and strongly suggested he cooperate. This encounter thoroughly frightened Cook, who was on probation. Tr. at 91. Later, police drove Cook to police headquarters where he provided a statement in which he asserted: (1) Banks had stayed with him on the weekend of April 12 and was driving a car that looked like Whitehead's Mustang; (2) during the course of the weekend Banks said he had killed a white boy; (3) Banks left the car and a .25 caliber pistol with Cook to discard; (4) Cook later abandoned the car in west Dallas and sold the gun to a neighbor. Tr. 142, Tr. Ex. B-02 at 1, 3. Cook was then transported

back to his home and was directed by police to go to the neighbor's house and retrieve the .25 caliber pistol. Tr. Ex. B-03 at 1. Cook did so. Officer Huff seized the pistol and submitted it for forensic testing. Tr. Ex. C-2 at 7.

On April 24, Banks was transported back to Bowie County. *Id.* He made no statements to police except to protest his innocence. The following day, he was formally charged with Whitehead's murder. Tr. Ex. C-2 at 8. Within days, Banks' parents retained Lynn Cooksey, a former District Attorney, to represent their son. Tr. at 210-11.

Prior to trial, the Bowie County District Attorney's office wrote to counsel to advise that there would be no need to litigate discovery issues. The letter stated unequivocally that "we will, without necessity of motions, provide your office with all the discovery to which you are entitled." 1SR at 13.

On August 15, 1980, Mr. Cooksey filed several standard pretrial motions, including one seeking discovery, 1SR at 17-28, but did not seek a hearing date on a single motion prior to trial. On the first day of jury selection, he commented repeatedly on his lack of preparation. He told the judge, "I'm not in possession of any information on any of the State's witnesses." 1SR at 99. Even though it had been provided to him a week earlier, Cooksey had not even read the State's witness list. At this hearing, he had to request another copy. *Id.* at 103. After jury selection and just prior to the trial's commencement, he again complained that the State had not turned over information about witnesses' prior convictions. He said "I don't have it yet and I cannot effectively cross-examine these people without it." 7SR at 1901. Even after the trial began, he announced that he had "never been to the [crime scene]," nor viewed certain crime scene

photographs. *Id.* at 2003-2005. Moreover, he later reported that he had "not seen the ballistics report." *Id.* at 2031.

Jury selection consumed several days. Near its end, Mr. Banks passed a note to Mr. Cooksey that stated "we need[] black[s]." Pet. RE Tab J. Cooksey wrote in reply, "State will strike all blacks."[1] *Id.* The prosecution, as predicted, used four peremptory strikes to remove all African Americans from the qualified pool. Cooksey made no objection to these strikes and an all-white jury was seated.

At trial, Patricia Hicks and Patricia Bungardt identified Mr. Banks as the person with Mr. Whitehead on the evening of April 11. 9SR at 2150, 2154. Both reported no animosity between Mr. Banks and Mr. Whitehead. *See id.* at 2148.

Mike Fisher testified that he was awakened by two loud noises at roughly 4:00 a.m. on Saturday morning. *Id.* at 2158. Pathologist DiMaio testified that Whitehead died from three bullet wounds, *id.*, at 2390, but was not asked to opine on when Whitehead was shot.

Robert Farr testified that he accompanied Mr. Banks to Dallas to secure a pistol. He also testified that after Mr. Banks made a brief stop at Charles Cook's house and returned to the car, Banks said that the .22 pistol he had just received from Cook was not his pistol; his was with a "broad in West Dallas." *Id.* at 2254-61, 2267-69. While Farr admitted that he was a user of illegal drugs, he denied that he was a paid informant. *Id.* at 2274.

Charles Cook was the central witness during the guilt phase. He testified that Mr. Banks drove up in front of his Dallas home at roughly 8:30 a.m. on Saturday, April 12, in a green

[1] Cooksey was the former District Attorney of Bowie County and had left that office only twenty months prior to Mr. Banks' trial.

Mustang, and that during the next two days he heard Banks confess to killing a white man in Texarkana. *Id.* at 2285-97. He also testified that at Mr. Banks' direction, he sold a pistol Mr. Banks left with him and abandoned Banks' car. *Id.* at 2303-05. Cook told jurors that he had spoken to no one in preparation of his testimony. *Id.* at 2314. The prosecutors assured the jury that Mr. Cook's testimony was completely truthful. 10SR at 2450.[2]

Lastly, firearms examiner David Jones testified that the bullets recovered from Mr. Whitehead and the crime scene likely were fired from the .25 pistol retrieved from Bennie Lee Jones and submitted to the lab by Deputy Sheriff Huff. *Id.* at 2357-58.

The defense presented no evidence. Instead, it sought through cross-examination to show that neither Charles Cook nor Robert Farr were credible witnesses. The jury deliberated for several hours, and just after 11:00 p.m. on September 30, convicted Mr. Banks of capital murder. *Id.* at 2485.

The penalty phase convened the next morning. The state's case for the death penalty and its belief that Mr. Banks would likely commit acts of violence in the future rested entirely upon the testimony of two witnesses: Vetrano Jefferson and Robert Farr. Jefferson, Mr. Banks' common law brother- in- law, testified that an unprovoked Mr. Banks struck him with a pistol and threatened to kill him one week prior to the Whitehead killing. *Id.* at 2493-94. Farr returned to

[2] Three other family members and a neighbor were called to corroborate minor portions of Mr. Cook's blockbuster testimony. A sister, Carol Cook, confirmed that she met Mr. Banks that weekend, when he and Mr. Cook came to her home in a green Mustang. *Id.* at 2362-65. Mr. Cook's former wife, Ida Mae Martin, confirmed that she was with Mr. Cook when Mr. Banks appeared on that Saturday morning, that he stayed at their home during the weekend, and that she and Mr. Cook loaned Mr. Banks money for his bus ticket back to Texarkana. *Id.* 2338-42. Mr. Cook's grandfather, Bennie Whiteurs, testified that Mr. Banks stayed in the family's home that weekend. *Id.* 2358. Finally, neighbor Bennie Lee Jones confirmed that he purchased a .25 pistol and other items from Mr. Cook shortly after Mr. Banks left Dallas. *Id.* 2356-61.

the stand and testified that the reason Banks had driven to Dallas on the evening of his arrest was so that Banks could reclaim his gun and commit armed robberies. *Id.* at 2500-02. Farr also reported that Banks said the gun would allow him to take care of any trouble that might arise during a robbery. *Id.*

The defense called several hastily assembled acquaintances of Mr. Banks and his parents. Each testified briefly that Banks was a respectful, churchgoing young man. *Id.* at 2514-2531. Two additional witnesses were called to discredit Mr. Farr. James Kelley testified that he had recently driven Farr to a number of doctors' offices to fill phoney prescriptions, *id.* at 2540-50, and former Arkansas police officer Gary Owen testified that Farr had served as a paid informant in that state and was known as unreliable. *Id.* at 2557-58. Finally, Mr. Banks testified and maintained his innocence. He pointedly contested Farr's account that he, rather than Farr himself, wanted the gun to commit robberies, and assured jurors he would live peacefully in prison if given a life sentence. *Id.* at 2566-69.

In closing, the prosecution argued that the evidence showed clearly that Mr. Banks would be dangerous in the future and that the special issues had been proven. *Id.* at 2578-82. Even though Farr had denied he was a paid informant, the prosecutor assured jurors that "he has been open and honest with you in every way . . . ." 10R 2579. Moreover, the prosecutors told jurors that Farr's testimony was of "upmost importance" to their case. The defense argued briefly that the evidence was insufficient. *Id.* at 2590-95. The jury found the state's evidence established the special issues and the judge imposed a sentence of death. *Id.* at 2598-2602.[3]

[3] On direct review, the Texas Court of Criminal Appeals affirmed the conviction and death sentence. *Banks v. State*, 643 S.W.2d 129 (Tex. Crim. App. 1982). This Court denied certiorari. *Banks v. Texas*, 464 U.S. 904 (1983).

HOW THE FEDERAL QUESTIONS WERE RAISED BELOW

This petition presents four issues, each of which were raised in post-conviction proceedings.

a. Suppression of Impeachment Evidence of Key Penalty Witness Farr

In a state habeas petition filed in January, 1992, Mr. Banks alleged that the State's failure to disclose at trial that Robert Farr was a paid informant and that his testimony had been misleading violated due process. While the State filed a detailed response to every other claim raised in the petition, it made no response to this issue. Mr. Banks was unable to locate Mr. Farr to submit an affidavit or proffer of evidence. Neither the trial court's recommendation of denial of relief nor the Court of Criminal Appeals' order denying the writ made reference to this claim. *See* App. E & D.

Mr. Banks again pleaded this claim in his federal petition filed below. Because the state courts had not conducted an evidentiary hearing on this claim, he moved the court for discovery and for an evidentiary hearing. In support of these requests, Mr. Banks stated that his representatives had finally tracked down Robert Farr in California and Farr revealed for the first time in a declaration that he had been a paid informant in this case *and* that his critical testimony concerning Banks' intent to commit robberies was false. 2R at 598, Ex. B. The Magistrate Judge granted a hearing on this issue.

Farr testified that he worked as an informant for various police agencies before, during and after Mr. Banks' arrest and prosecution.[4] These agencies included Texarkana law

[4] Farr's testimony was by declaration. At the time of the hearing, he resided in California. Prior to the hearing, Mr. Banks moved that he be permitted to depose Mr. Farr or submit his declaration in lieu of live testimony for two reasons: (1) Farr did not want to return to Texarkana because he feared for his life

enforcement agencies. *See* Tr. Ex. B-1 at 1. He was frequently paid for these services. *Id.* Law enforcement in Texarkana and elsewhere knew of his use of illegal drugs and practice of falsifying prescriptions to procure drugs. However, officers never arrested him for these activities. *Id.* Farr testified that he became involved in this case after Deputy Huff demanded help. *Id.* at 2. Farr testified that he believed that if he did not agree to assist, Huff would have arrested him on drug charges and seen to his prosecution. Farr made clear that he was paid for his services in this case and that his damaging testimony about Banks wanting a gun so that he (Banks) could commit additional violent crimes was false. Moreover, he said he was under the influence of drugs when Banks was arrested in Dallas.[5]

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given his prior services as a police informant and (2) he was in poor health. The Director did not insist that Mr. Farr be produced for cross-examination or seek to depose him.

[5] Farr's declaration states as follows:

> 7. . . . I told [Deputy Huff] that he would have to pay me money right away for my help on the case. I think altogether he gave me about $200.00 for helping him. He paid me some of the money before I set Delma up. He paid me the rest after Delma was arrested and charged with murder. He said that the case was worth a lot more than that to him. He did not tell me at that time that Delma was a murder suspect in the case of Richard Whitehead. He only told me that he wanted me to help him find Delma's gun.
>
> 8. In order to help Willie Huff, I had to set Delma up. I told Delma that I wanted to rob a pharmacy to get drugs and that I needed his gun to do it. I did not really plan to commit a robbery but I told Delma this so that he would give me his gun. I talked a lot about my plan to Delma and finally convinced him that I needed his gun for the robbery. That's when Delma told me his gun was in Dallas. I convinced Delma to drive to Dallas with me to get the gun.
>
> 9. After I convinced Delma to give me his gun, I called Willie Huff and told him that Delma and I were going to drive to Dallas to get the gun. I knew that Willie would follow us to Dallas because he told me during that conversation that he would follow us. This was the third or fourth conversation I had with Willie.
>
> 10. Delma, Marcus Jefferson and I drove to Dallas in my car. I had drugs with me. When we got to Dallas, we stopped at a man's house and Delma went to the house and came back with a gun. After we drove away from the house, our car was pulled over by the police on

Id. Farr further testified that he left Texarkana shortly after Banks' trial on the advice of his law enforcement handlers who feared for his life. Consistent with these concerns, Farr testified that he hid out and would *not* have spoken with representatives of Mr. Banks before he finally chose to do so in the fall of 1996 (after the completion of state post-conviction proceedings). *Id.*

Both prosecutor James Elliott and Deputy Huff testified that the prosecution utilized Farr as an informant in Bank's case. Tr. at 54, 86. Huff also testified that Farr was paid roughly $200 for his services. *Id.* at 88-89.

On May 11, 2000, the Magistrate Judge issued her report and recommended that the writ be granted on this claim. App. C at 44. The Magistrate Judge concluded that Mr. Banks' sentence was constitutionally tainted by the suppression of Farr's paid informant status. She found that the evidence showed that at trial, "[t]he state attempted to portray Farr's involvement with Banks as one of an innocent acquaintance," but that the record showed conclusively that he was a paid informant. Given the importance of his testimony to the state's case for a death sentence, she concluded Mr. Banks was entitled to relief.

> Farr was one of the only two witnesses called by the State during the punishment phase. He testified that he, along with Banks and Marcus Jefferson, traveled to Dallas to retrieve the gun so that Banks could commit several armed robberies.

> the interstate. I was taken to the Dallas police station with Marcus. I don't know where Delma was taken because he was in a different police car. I was allowed to leave. I wasn't charged with anything.
>
> 11. While I was in the Dallas police station, I saw Bowie County D.A. investigator, Charlie Leathers. He told me that Delma was going to be charged with murder because they had found the murder weapon. I asked Charlie for money to help me get home and he gave me about $25.00. Charlie knew that I had convinced Delma to go to Dallas because Willie Huff had asked for my help. I knew that Charlie and Willie were working together on the investigation of Delma.

> The clear purpose of this testimony was to persuade the jury that Banks posed a continuing danger to society. Farr's testimony was misleading and inaccurate. At no time did the State correct Farr's erroneous testimony or announce Farr's paid informant status. Moreover, the State placed great reliance on Farr's testimony during the penalty phase. Indeed, the prosecutor characterized Farr's punishment phase testimony as "of the utmost significance," because it helped establish that Banks posed a "danger to friends, and strangers alike."

App. C at 43-44. The district court accepted this recommendation. App. B at 6.

The Fifth Circuit panel reversed. It concluded that the evidence relied upon below was defaulted because Mr. Banks had exercised insufficient diligence in attempting to locate either Farr or Deputy Huff during state habeas proceedings. App. A at 17-23. The panel did not cite or refer to Mr. Banks' primary argument, based squarely upon *Strickler v. Greene*, 527 U.S. 263 (1999), that he was entitled to present this evidence below. *Id.* at 26-33. Alternatively, the panel held that the district court also erred in finding the evidence to be material. The panel's analysis did not consider, *inter alia*, the fact that the trial prosecutors told the jury that Farr's testimony was of "utmost importance" to their case.

b. **Ineffective Assistance of Counsel at Penalty Phase**

Mr. Banks alleged in the 1992 state habeas petition a multi-faceted claim, supported by proffered affidavits, that his attorney had failed to adequately prepare for and represent him at the penalty phase of trial. Through affidavits from his parents, he proffered that trial counsel had conducted virtually no pretrial preparation for the penalty phase. When the guilty verdict was returned at 11:00 p.m., trial counsel asked Mr. Banks' mother to make sure that ministers from the community were present the next morning to testify. She made phone calls into the early morning hours searching for witnesses. The proffer confirmed what the trial transcript suggested strongly – that trial counsel never spoke to any of the witnesses who offered brief testimony, nor

conducted any prior investigation to learn of evidence that would show that Mr. Banks would not be a danger in the future.

The proffered evidence, which was available at the time of trial, showed that Mr. Banks had an extremely difficult upbringing, yet had no prior convictions. Mr. Banks' father was an alcoholic who would abuse and terrorize the family when he drank. On repeated occasions, Mr. Banks' father beat him and his mother, often forcing Mrs. Banks to flee the family home with her children for their safety. Even when his father was sober and remorseful, Mr. Banks could not have a normal relationship because his father worked at a chicken plant, and Mr. Banks was allergic to chickens. He was born allergic to many substances and often suffered from horrid rashes or hives. In the heat of Texas summers, he wore pants and long-sleeve shirts to hide his rash and hives and was the regular target of ridicule from peers.

The proffer also contained the expert opinion of psychologist Gregorio Pena. Dr. Pena found that Mr. Banks suffers from brain impairment that caused significant language and cognitive disabilities. He found that Mr. Banks had experienced numerous intense traumas during his childhood that were the direct result of his dysfunctional family, and that his father had beaten and terrorized him. He confirmed that Mr. Banks suffered from chronic bleeding skin and hives throughout his life and that these "largely untreated symptoms" led directly to disfigurement. Dr. Pena also found that given Mr. Banks' entire profile, he likely would be a nonviolent inmate in a highly structured environment such as prison.

The State presented affidavits from Cooksey and his investigator, Dennis Waters. Without making any factual determinations, the trial court recommended denial of the claim and simply declared that "counsel for Appellant at trial did give Appellant effective assistance of counsel

throughout all stages of the trial proceedings, including voir dire and pre-trial." App. G at 3. The Court of Criminal Appeals summarily accepted this recommendation and denied relief. App. D.

Mr. Banks raised the same claim in his federal habeas petition. Because the state court conducted no hearing and did not return any findings of fact on this claim, the Magistrate Judge granted an evidentiary hearing at which Mr. Banks presented several witnesses.

Mr. Banks' parents–Delma Banks, Sr., and Ellean Banks–testified that they hired Mr. Cooksey shortly after learning of their son's arrest. Cooksey sought a fee of $10,000, but they were able to pay him only $1,000. Tr. at 211. They also gave him some funds for the retention of investigator Waters. Prior to trial, they had only brief meetings with Cooksey and Waters that lasted "no longer than 10 to 15 minutes." *Id.* at 212. At none of these meetings did Cooksey or Waters ask for information about Delma, Jr.'s life that would be considered mitigating or show he was unlikely to be dangerous in the future. *Id.* at 224. At one point during the trial, Cooksey asked Mr. Banks, Sr. to meet with him, the judge and Delma, Jr., to discuss a plea offer that would have resulted in a life sentence in exchange for a plea of guilty to murder. Mr. Banks, Sr. agreed to the meeting but resisted urging his son to accept the deal when his son protested his innocence. *Id.* at 215. Mrs. Banks reported that during the guilt phase of trial, Cooksey approached her and asked her to testify that Delma Jr., was home with her on Friday evening, April 11. *Id.* at 225. She refused to do so, and when she did, Cooksey "took me by the arms and shook me and he said that what kind of mother is you that will not tell a little white lie to save your son's life. I told him I couldn't lie." *Id.*

Mrs. Banks testified she was present when the jury announced its verdict of guilty. The verdict was reached late at night. When she heard it, Mrs. Banks blacked out. *Id.* at 226. While

she waited to be taken to a hospital, Cooksey asked her to get as many ministers as she could in the courtroom the next morning. *Id.* at 225. At the hospital, she insisted that she be released. She was discharged at about 1:00 a.m. Once home, she called ministers until 3:00 a.m. to assure witnesses would be present for her son. Several showed up for the penalty hearing.

Both Banks parents had testified briefly at the sentencing hearing. Each had been surprised, however, as neither had ever spoken to Cooksey about what information he wanted them to convey to the jury. *Id.* at 216-17; 227. At the federal hearing below, both provided detailed social history information about themselves and Mr. Banks that they did not have an opportunity to tell the sentencing jury, and which would have shown he was unlikely to be a danger in the future.

Mr. James Kelly also testified at the federal hearing. Tr. at 232. Prior to trial, he had never been contacted by the defense nor told he would likely be a witness. Even on the morning of the sentencing hearing, he had no idea he would be called as a witness. When deputies came to pick him up to bring him to court, he "was drunk." *Id.* at 233. In court, he spoke for the first time to Cooksey, but in that minute or two, he did not learn why he was being called. Kelly's trial testimony focused upon Robert Farr and Farr's use of bogus prescriptions to secure drugs.

Vetrano Jefferson, another State's trial witness, also testified below. At trial, he had testified that Mr. Banks was the aggressor in a fight they had shortly before Mr. Banks was arrested in this case. 10SR at 2493-94. At the federal hearing, Mr. Jefferson admitted that version was false and testified that he, not Mr. Banks, was the aggressor. "I was drunk that day . . . and I was threatening my sister and he defended her. . . ." Tr. at 166. When asked who started the fight, Mr. Jefferson stated "I did." *Id.* He also testified that he never spoke to Mr. Cooksey nor Mr.

Waters prior to trial and that he would have been willing to do so had they asked to speak with him about the incident. *Id.* at 168.

Mr. Banks also called Dr. Mark Cunningham, a forensic psychologist. Dr. Cunningham testified that he conducted a thorough psychological evaluation of Mr. Banks. Tr. 279. This evaluation revealed, as had Dr. Pena's, that Mr. Banks grew up in a violent home environment due almost entirely to his father's chronic alcohol problem and repeated acts of abusive behavior directed at Mr. Banks as well as the rest of the family. Tr. at 265-70. He found that Mr. Banks had chronic health problems and learning disabilities that prevented him from enjoying success in school. *Id.* at 272. He concluded that a detailed risk assessment of Mr. Banks at time of trial would have shown that there was little likelihood that Mr. Banks would commit additional acts of violence in the prison setting. *Id.* at 279-81.

Additional evidence was presented to establish that the State's theory of guilt was easily assailable had counsel made the effort. Two witnesses, State's trial witness Mike Fisher and Alabama medical examiner Dr. LeRoy Riddick, gave testimony to establish that one essential element of the State's case against Mr. Banks – that Mr. Whitehead was shot at roughly 4:00 a.m. on Saturday, April 12 -- was not true and could have been discredited had counsel conducted a minimally adequate investigation of the underlying facts.

At trial, the State's theory was that Mr. Banks was alone with Mr. Whitehead during the early morning hours of April 12 in the Nash park where Mr. Whitehead's body was found on April 14. According to this theory, Mr. Banks shot Mr. Whitehead three times at roughly 4:00 a.m., took Whitehead's car, then drove 180 miles to Dallas and arrived in front of Mr. Cook's

house by 8:15 or 8:30 a.m. The crucial timing of the murder was purely inferential and came solely from the testimony of Mike Fisher.

At trial, Mr. Fisher testified that he was asleep in a house that bordered upon the park in the early morning hours of April 12 and was awakened by two loud noises. He testified that his companion told him it was a few minutes after 4:00 a.m. He was unable to confirm the noises were, indeed, gunshots, but said they "sounded like gunshots." 9SR at 2159. On cross-examination, defense counsel asked only whether he heard two loud noises. *Id.* at 2160. The prosecution asked the jury to conclude that Mr. Fisher, at 4:00 a.m., heard two of the three shots that fatally wounded Mr. Whitehead. 9SR at 2444.

At the hearing below, Mr. Fisher supplemented his trial testimony with significant qualifying information. He testified that he recalled being awakened by loud noises coming from the park behind the house. Tr. at 203. He said, however, that he knows nothing about guns, and thus could not be certain that the noises he heard were gunshots. *Id.* He conceded that the noises could have been firecrackers or car backfire, or even rifle shots (as opposed to pistol shots). Moreover, the noises could have occurred as early as 3:00 a.m. and as late as 5:00 a.m. *Id.* at 204.

Dr. Riddick's testimony focused upon the time of death issue. Tr. at 183-88. He explained that several factors identified during the autopsy strongly suggested that Whitehead was shot not at 4:00 a.m. on April 12, but late in the evening on April 12 or early in the morning on April 13 (when Mr. Banks was in Dallas). *Id.* First, both Deputy Huff and Dr. DiMaio observed full rigor mortis in Whitehead's body. Rigor mortis usually appears very soon after death, renders the body stiff within 12 to 24 hours after death, and then wanes 36 hours after death. Huff observed Whitehead roughly 54 hours after Fisher heard the loud noises, and DiMaio roughly 78 hours

afterwards. Second, Dr. DiMaio should have observed a drying of the lips and a graying discoloration of the lower abdomen, both of which appear within 72 hours after death *Id.* at 187. He looked for these symptoms but reported finding neither. Moreover, DiMaio reported no clouding of the cornea, he reported the corneas were clear. *Id.* This is highly unusual for someone who had died more than 72 hours prior to the autopsy. Based upon all of these reported factors, Dr. Riddick concluded that the available forensic evidence overwhelmingly pointed toward a late Saturday evening or early Sunday morning time of death. *Id.* at 197.[6]

The Director presented only one rebuttal witness -- Dennis Waters. Tr. at 334.[7] Mr. Waters testified that he was hired by Mr. Cooksey as an investigator. *Id.* at 335. He testified that he interviewed a number of witnesses. However, he could not recall their names. He testified that he visited and photographed the crime scene. *Id.* at 335-36. He said that Mr. Banks told him prior to trial that he had hitchhiked to Dallas during the early morning hours of April 12 but was unable to provide Mr. Waters with the name of the individual who picked him up. Waters did not believe this account. *Id.* at 337. Waters conceded that Cooksey never requested that he take a social history from Mr. Banks, nor obtain school records. *Id.* at 340. He also agreed that his efforts focused mostly on the guilt rather than punishment phase of trial.

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[6] This evidence debunking the State's time line was entirely consistent with expert evidence Mr. Banks had proffered before the state court that suggested that Mr. Whitehead's car – the means by which Mr. Banks purportedly traveled from the crime scene to Dallas – could *not* have made the trip to Dallas without significant repair. Such repair services were not available during the early morning hours the State contends Mr. Banks drove the ailing car from Texarkana to Dallas. Pet. RE Tab H at 1-2.

[7] Prior to the hearing, the Director had indicated that he would likely call defense counsel Cooksey as his witness. The Director rested his rebuttal without calling Mr. Cooksey.

The Magistrate Judge concluded that the record clearly established that trial counsel failed to provide constitutionally effective assistance during the penalty phase. She found "an almost complete lack of preparation," as "counsel waited until the jury rendered its guilty verdict before instructing Bank's (sic) mother to gather witnesses for the punishment phase, which began the following day." App. C at 21-22. She further determined that "counsel did not interview any of these witnesses prior to their testifying. Trial counsel admitted during an in-chambers conference that he was ignorant of the identity of the punishment phase witnesses and their possible testimony. He had to ask his client, on the record, who the witnesses were and their relationship to Banks. Even this attempt to acquaint himself with the witnesses did not occur until several had already testified." *Id.* She found the record contained ample evidence -- the severely traumatic childhood, the mental health limitations and the lack of a criminal record -- to demonstrate the likelihood of a different result had the jury heard this evidence. The recommendation was adopted by the district court.[8]

The Fifth Circuit panel reversed. The panel agreed with the district court that counsel's performance was objectively unreasonable, but concluded that the district court erred in ruling that Mr. Banks had demonstrated adequate prejudice. App. A at 33-43. The panel reached this conclusion after dividing the mitigation evidence into several categories, and, after a discussion of each, concluding that each particular type, by itself, did not establish a reasonable probability of a different result. At no time did the panel consider all the mitigation evidence collectively in

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[8] This ruling is consistent with the testimony of a prominent Texas capital trial attorney Mr. Banks presented who opined that the record showed an abject failure of trial counsel to both investigate the case and defend his client, and ample mitigation evidence that would have been persuasive with Texas jurors to reject a finding that Mr. Banks would likely commit future acts of violence.

reaching this conclusion, as had the district court, and as required by *Strickland v. Washington*, 466 U.S. 668 (1984) and *Williams v. Taylor*, 529 U.S. 362 (2000).[9]

c. **Suppression of Impeachment Evidence of Key Guilt Phase Witness Cook**

Mr. Banks alleged in the 1992 state habeas petition that the State, in violation of due process, had suppressed impeachment evidence concerning Charles Cook including evidence that Cook had made a deal for his testimony that would result in the dismissal of serious charges pending against him in Dallas. Representatives of Mr. Banks located Cook and he told them that he *did* have a deal for his testimony and that he had rehearsed his testimony prior to taking the stand. But Cook refused to sign an affidavit and refused to cooperate further. Mr. Banks was able to proffer only the unsigned affidavit of Cook.

The State responded by declaring that there was no deal, and filed supporting affidavits from prosecutor Elliott and Deputy Huff. It failed to disclose other impeachment material. The court found that "there was no agreement between the State and the witness Charles Cook." App. G at 2. This finding was accepted by the Court of Criminal Appeals. *See* App. D.

In his federal petition, Mr. Banks alleged *Brady* material concerning Charles Cook was suppressed. Thereafter, his representatives were able to speak with Cook again, and Cook revealed for the first time, *inter alia*, that significant portions of his testimony were false and were given under pressure from law enforcement officials. Directly contradicting his trial testimony, Cook stated his misleading testimony had been heavily rehearsed prior to trial. *Id.* On the basis of

[9] Further, the panel found that some of the evidence Mr. Banks presented at the federal hearing was unexhausted and thus could not be considered. It so held with regard to testimony from Dr. Cunningham and state's witness Vetrano Jefferson.

his affidavit and corroborative affidavits from two other state witnesses, Mr. Banks moved the court for discovery and for an evidentiary hearing. The Court granted these motions.

In compliance with the discovery order, the District Attorney's office turned over, *inter alia*, a 74-page interview of Charles Cook by law enforcement officials transcribed shortly before trial. The transcript, which had never been disclosed previously, contained considerable impeachment material.[10] Both Mr. Banks and the Director confirmed in pre-hearing submissions that the transcript would be introduced into evidence. Prior to the hearing, the Court entered an order to clarify the issues on which the parties could submit testimony. One such issue was whether the trial prosecutors had failed to disclose impeachment evidence concerning key guilt phase witness Charles Cook.

At the hearing, the transcript of the September, 1980 interview of Cook was offered into evidence and received considerable attention. Tr. Ex. B-04. Prosecutor Elliott confirmed that this document was generated during interviews conducted shortly before trial. He identified handwritten notes on several pages and identified the writing as that of his co-counsel, Raffaelli, and stated that Raffaelli possessed the transcript at trial. Tr. at 45-47.[11] Elliott conceded that the transcript was not turned over to the defense prior to or during trial. Tr. at 47. The trial record indicates that only Mr. Cook's April, 24, 1980 statement to police was disclosed at the conclusion

[10] It showed, for example, that Cook could not keep his story straight on even basic events, and repeatedly described significant events differently from his April. 1980 statement. Throughout the interview, law enforcement officials mocked his credibility. Pet. RE Tab F.

[11] Mr. Raffaelli was the elected District Attorney at the time of trial. He died prior to the hearing below.

of Cook's direct testimony. 9SR at 2312. Mr. Elliott testified he elected to disclose the lengthy transcript to Mr. Banks only to comply with the Magistrate Judge's discovery order. Tr. at 69.

Charles Cook testified that he spoke with law enforcement extensively about his testimony prior to trial. Tr. at 135. He also stated that much of his trial testimony was rehearsed and that key portions were not truthful. Tr. at 137-38, 144-46.

Even though Mr. Banks extensively briefed this issue, the Magistrate Judge failed to adjudicate this claim. Mr. Banks filed a timely objection to this failure. On August 18, 2000, the District Court also refused to adjudicate the claim, concluding that Mr. Banks should have formally amended his petition after receiving disclosure of the pretrial statement, and that the issue had not been tried by consent per Federal Rule of Civil Procedure 15(b). The Court thereafter rejected Mr. Banks's motion to modify or amend the judgment. 5R at 1209-17, and further denied issuance of a Certificate of Appealability, (COA).

The Fifth Circuit panel also refused to issue a COA. The panel held that Mr. Banks had failed to demonstrate that the question of whether an "evidentiary hearing" in a habeas proceeding is the functional equivalent of a "trial" for FRCP 15(b) purposes is one that jurists of reason would find debatable. App. A at 48-52.

d. Racial Discrimination in Jury Selection

Mr. Banks alleged a *Swain v. Alabama*, 380 U.S. 202 (1965), jury discrimination claim in the 1992 state petition and proffered voluminous statistical and testimonial evidence demonstrating that the District Attorney's office had for years routinely and systematically excluded African Americans from felony jury service by peremptory challenge. In February, 1993, the state trial court recommended that relief be denied without an evidentiary hearing. App. G. at

2-3. Mr. Banks appealed, and the Texas Court of Criminal Appeals ordered the trial court to hold an evidentiary hearing on this claim. App. F at 1.

At the evidentiary hearing, Mr. Banks presented statistical, expert and direct evidence establishing that during the six-year period leading up to his trial, from 1975 through 1980, Bowie County prosecutors accepted more than 80% of qualified white jurors in felony trials but peremptorily struck more than 90% of similarly qualified African American jurors. Several attorneys who represented criminal defendants testified that prosecutors routinely struck black jurors. The evidence also showed that prosecutors habitually utilized race-coded jury strike sheets. Trial counsel, the former elected District Attorney, testified that he did not object to the exclusion of African American jurors from Mr. Banks' jury because he believed there was no legal basis for a *Swain* challenge because he was aware of *one* case in which the prosecution had allowed blacks to sit on a felony jury. The state proffered reasons, which it claimed were race-neutral, for striking each of the African American jurors.

The state habeas court rejected Mr. Banks' *Swain* claim. Although it concluded that the evidence from 1979 and 1980 was sufficiently strong to establish a *prima facie* case of discrimination, it believed that the prosecutor's articulation of race neutral reasons for the four peremptory strikes in Mr. Banks' case sufficiently rebutted the *prima facie* showing. App. E at 5, 9. The court deemed the data from 1975-1978 to be irrelevant because the District Attorney prosecuting Mr. Banks was not in office then. App. E at 5. It also found trial counsel's failure to object defaulted the claim. *Id.* at 2-3. On the basis of these findings, the Court of Criminal Appeals denied relief. App. D at 1.

Mr. Banks raised the claim in his federal petition. The Magistrate Judge permitted him to submit two affidavits to supplement the record made before the state court. The district court denied relief after concluding it was procedurally defaulted, and refused to issue a COA. App B at 4. The panel below also refused to issue a COA because it found the claim defaulted. It held that while Mr. Banks had established "cause" for counsel's failure to timely object, the state court's determination that the prosecution's justifications for striking the four jurors were race-neutral foreclosed a finding of "prejudice" to overcome the default. App. A at 63-74.

REASONS WHY THE WRIT SHOULD BE GRANTED

This case warrants review for a number of substantial reasons. First, the Fifth Circuit's reversal of relief on the Farr issue conflicts sharply with *Strickler v. Greene* and decisions from other Courts of Appeals. In this case, the State's assurances at trial that discoverable material would be disclosed were much stronger than in *Strickler;* here, the trial prosecutors promised to affirmatively reveal such information, and after Farr – their key penalty phase witness – testified untruthfully that he was not an informant, they not only did not correct this misrepresentation, but instead they assured the jury Farr had been truthful. *Strickler's* holding that habeas counsel can rely upon such assertions in guiding post-conviction investigation was given no weight by the Fifth Circuit panel. Moreover, other decisions from this Court show the panel's materiality ruling to be erroneous as well.

Second, its reversal of relief on penalty phase ineffectiveness grounds cannot be harmonized with *Williams v. Taylor* and numerous other decisions from Courts of Appeals. The character and quantity of the evidence is indistinguishable from that found sufficient in *Williams*, a case the panel did not cite. Moreover, unlike *Williams*, where the petitioner had a substantial and

violent criminal history, Mr. Banks had no such history. Consistency in the enforcement of the law requires certiorari to review the panel's decision.

Third, the panel's refusal to even consider another meritorious *Brady v. Maryland* claim, this one concerning powerful impeachment evidence of the state's key guilt phase witness because an "evidentiary hearing" in habeas proceedings is not a "trial" for Rule 15(b) purposes, is inconsistent with *Harris v. Nelson*, 394 U.S. 286 (1969) and *Withrow v. Williams*, 509 U.S. 680 (1993). This Court has long held that where appropriate, the Federal Rules of Civil Procedure apply in habeas actions, and there is no reason why that rule should not fully apply to claims litigated in habeas actions.

Finally, the panel's holding that Mr. Banks' *Swain v. Alabama* claim is defaulted is inconsistent with *Ford v. Georgia*, 498 U.S. 411 (1991), because there was no established rule requiring trial level *Swain* objections. Moreover, the panel's reliance upon the state court finding that the State adequately rebutted the prima facie showing of discrimination rests squarely upon a mistaken rule of law that led the state court not to consider much of Mr. Banks' pattern and practice evidence. The Court is presently considering this same issue in *Miller-el v. Cockrell*, No. 01-7662. It should at least hold this case until that case is decided.

ARGUMENT

The Fifth Circuit's Reversal on the Farr Claim Is Entirely At Odds With *Strickler v. Greene* And Precedents from Other Circuits

The panel concluded that the district court erred in granting sentencing relief because the key evidence presented in support of the claim – the testimony of informant Robert Farr and Deputy Huff – was not first presented to the state courts, and because Mr. Banks failed to

establish adequate cause to excuse this failure. Moreover, the panel held that relief should also have been denied because the non-disclosed information was not material. Respectfully, both these conclusions are contrary to governing law and warrant review.

a. **The panel's "cause"determination is inconsistent with *Strickler v. Greene***

In concluding that Mr. Banks failed to take sufficient steps to discover the Farr and Huff evidence while the case was pending before the state habeas court, the panel accepted the Director's argument that the state had not interfered with Mr. Banks' access to either witness and that there was an insufficient showing as to why Mr. Banks could not have spoken to Farr prior to the conclusion of these proceedings. But neither the panel nor the Director discuss the case that governs this issue, *Strickler v. Greene*, 527 U.S. 263 (1999), nor explain why it does not require affirmance of the district court's opinion on this point.

In *Strickler*, a Virginia capital habeas petitioner attempted to raise a *Brady* claim in federal district court without having first presented either the claim or supporting evidence in state court. The claim was based upon a number of police documents Strickler obtained pursuant to discovery in the federal court that contained impeachment material concerning an important state witness. At trial, the prosecutor had maintained an open file policy and the defense reviewed the file on several occasions. However, several documents later uncovered in federal discovery were not included in the trial file. During state post-conviction proceedings, new counsel for Strickler alleged that trial counsel had been ineffective for failing to file a discovery motion seeking *Brady* material. The state responded that such a motion was unnecessary because of the open file policy, and the state courts dismissed the petition. After discovering the documents while in federal court, Strickler pleaded a *Brady* claim. The district court found adequate cause for the failure to present

the claim in state court because Strickler had no independent access to the documents and state actors had repeatedly withheld them throughout the state proceedings. The court of appeals reversed. The panel concluded that Strickler defaulted the claim in state post-conviction because he could have developed the factual basis there but did not. He knew that the witness had been interviewed by police on several occasions prior to trial, and state law allowed him to seek discovery; had he filed a motion it is likely the state court would have granted it.

This Court rejected that analysis. The Court focused upon the circumstances in the trial court as those events would naturally influence the reasonable decisions of state habeas counsel. In *Strickler*, the habeas attorney knew that prior to trial, Strickler's counsel received open file discovery, but the key documents were not disclosed. It was reasonable for trial counsel to assume that the prosecutor would discharge his duty and disclose all exculpatory material. The Court concluded that "if it was reasonable for trial counsel to rely on, not just the presumption that the prosecutor would fully perform his duty to disclose all exculpatory material, but also the implicit representation that such material would be included in the open files tendered to defense counsel for their examination, we think such reliance by counsel . . . in state habeas proceedings was equally reasonable." 527 U.S. at 284. Thus, events concerning discovery in the trial court are highly relevant to a habeas petitioner's duty to investigate in state post-conviction proceedings. In this case, the panel ignored this controlling rule of law.

In Mr. Banks' case, the trial prosecutors not only assured him that all discoverable material would be provided without the need for a discovery motion, there were explicit representations (later proven to be untrue) that Farr was neither an informant nor had been paid for his services in this case. Prior to trial, trial prosecutors wrote to counsel and explained they

were prepared to provide discovery; there was no need for Mr. Banks to file a discovery motion. Mr. Banks had previously asked Deputy Huff to disclose the identity of the informant he mentioned in pretrial testimony. Huff had refused. At neither phase of trial did Farr tell jurors that he was an informant or had been paid in this case. Indeed, he expressly denied receiving any such payment when asked. The prosecutors not only did not correct this misrepresentation, they assured the jury that Farr had been honest. Thus, in the trial court proceedings, the state promised to disclose such material, did not correct the witness when he failed to disclose his true status, and then guaranteed jurors that Farr's testimony had been completely truthful.

Given these circumstances, *Strickler* teaches, trial counsel and Mr. Banks could reasonably conclude that whomever the informant was, it was *not* Robert Farr. And, as *Strickler* makes clear, if it was reasonable for trial counsel to so conclude, it was equally reasonable for habeas counsel to conclude similarly, as neither counsel nor Mr. Banks had any reasonable way to determine otherwise.[12] *See also Williams v. Taylor*, 529 U.S. 420 (2000)(juror bias and prosecution misconduct claims not barred in federal court because of petitioner's failure to raise in

[12] The panel speculated that had Mr. Banks simply made the efforts, he likely could have spoken to either Farr or Huff while the case was pending in the state habeas court. The record provides no support for this view. Robert Farr wanted no part in speaking to anyone about his work as a police informant. Not long after Mr. Banks' trial, he was warned by his law enforcement handlers that he should leave Texas as his life was in danger. He first went to Oklahoma and then to California to hide. While the panel states that Mr. Banks filed his federal petition only *after* contacting Farr, *see* App. A at 9, Mr. Banks had no luck in finding Farr until six months after the petition was filed. He was not happy when he was finally located, told Mr. Banks' representative that he would not have spoken with her previously, and made it clear that he would not return to Texas to testify voluntarily. While the Director had every opportunity to speak to Farr, or to command his presence at the federal hearing to challenge any of his assertions, it chose not to do so. Similarly, Deputy Huff did not volunteer any information about Robert Farr, and indeed, sought clarification from the court while on the witness stand that he could then reveal that Farr had served as his informant in this case. Tr. at 96.

state court as underdevelopment of claims were attributable to juror and prosecutor; defense counsel did not default claim by failing to check public records concerning each juror).[13]

b. Materiality Determination Is Also Inconsistent with Settled Law

The materiality inquiry requires a court to determine whether the missing "evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995). A review of the entire trial record is necessary to make this determination reliably. In *Strickler*, one important factor the Court focused on repeatedly was how the case was cast for the jury by the prosecution. *See Strickler* at 307-08. Here, the panel's analysis failed to focus upon such factors critical to the materiality analysis.

Farr offered uniquely damaging evidence. He testified that Mr. Banks was going to Dallas to obtain a weapon so that Banks could commit armed robberies, and, if necessary, kill reluctant victims. This testimony was both the heart and soul of the state's case for the death penalty and was uncorroborated.[14] The jury was explicitly urged to rely heavily on this evidence in its deliberations. One prosecutor characterized Farr's testimony to be "of the utmost significance," because it established Banks posed a "danger to friends and strangers alike." 9SR at 2593. The

[13] The Fifth Circuit's decision conflicts with other well-reasoned decisions in the circuits as well. *See e.g., Scott v. Mullin*, 303 F.3d 1222, 1228 (10th Cir. 2002)(mere speculation that exculpatory evidence may have been withheld does not impose duty on counsel to advance claim); *Crawford v. Head*, 2002 U.S. App. LEXIS 23420, *108-*109 (11th Cir.)(same); *White v. Helling*, 194 F.3d 937, 924-44 (8th Cir. 1999)(withholding of exculpatory evidence contributed to petitioner establishing cause for failure to raise *Brady* claim prior to federal habeas).

[14] The testimony of Vetrano Jefferson, Banks' common-law brother-in-law, concerning their fight was not evidence showing a likelihood of future dangerousness. *See Ellason v. State*, 815 S.W.2d 656, 663 (Tex. Crim. App. 1991)(fight between in-laws "not particularly probative" of whether defendant would commit criminal acts of violence that would constitute a continuing threat to society.)

other prosecutor assured jurors they could trust Farr as he had been "open and honest with you in every way." 9SR at 2579.

It is now beyond debate that Farr was not "open and honest . . . in every way;" he lied about not being a paid informant. Further, his narrative that made Mr. Banks appear exceedingly dangerous – that Banks was going to Dalles to get a gun so he could commit violent crimes and kill, if necessary – was a fiction. The prosecutor's plea to the jury to consider Farr's testimony as it was "of the upmost significant" is irrefutable evidence of the importance of Farr and his misleading narrative to the state's case for future dangerousness.

The panel's decision reversing the grant of relief is contrary to this Court's precedents beginning with *Giglio v. United States*, 405 U.S. 150 (1972), with other circuit decisions, *see e.g., Crivens v. Roth*, 172 F.3d 991 (7th Cir. 1999)(evidence undermining credibility of key witness material); *Reutter v. Solem*, 888 F.2d 578 (8th Cir. 1989)(misleading remarks by prosecutor that key witness had been completely forthcoming both improper and highly prejudicial); *United States v. Scheer*, 168 F.3d 445 (11th Cir. 1999)(witness testimony material particularly where prosecutor makes repeated reference to it in closing argument), and even other Fifth Circuit precedent *East v. Johnson*, 123 F.3d 235 (5th Cir. 1999)(*Brady* violation concerning witness prosecutors placed more reliance upon than any other witness to establish future dangerousness was material). Review is warranted to provide guidance to the lower courts.

The Panel Opinion Reversing the Grant of Relief Based on Counsel's Ineffectiveness at the Penalty Phase Ignores Settled Precedent to the Contrary

The panel committed similar error in rejecting the district court's determination that Mr. Banks demonstrated that trial counsel's plainly deficient performance showed a reasonable probability that, but for that performance, the jury would have rejected the death penalty.

a. **The panel decision is flatly inconsistent with *Williams v. Taylor***

In *Williams v. Taylor*, 529 U.S. 362 (2000), the Court considered an ineffective assistance of counsel claim that is nearly identical to the one raised by Mr. Banks.[15] Williams' trial counsel, like Mr. Banks', made next-to-no preparation for the penalty phase and had presented evidence at the sentencing phase only to the effect that Williams was a nice guy and had turned himself in. 529 U.S. at 369. During state habeas proceedings, new counsel proved that trial counsel had not begun to prepare for the sentencing phase until a week prior to trial and that readily available evidence could have shown the jury that, as a child, Williams had been repeatedly beaten by his father, had been sorely neglected by his parents, was slow mentally and yet was a good candidate to be an obedient prisoner. After hearing this evidence, the sentencing judge found that it raised a reasonable probability that the sentencing decision would have been different and recommended relief. *Id.* at 371. The state supreme court rejected this recommendation. It characterized the new mitigating evidence as showing only that Williams was not violent and

[15] There are two major differences in the cases that cut in Mr. Banks' favor. First, while Mr. Banks had no prior criminal record, Williams had an extensive one that included prior acts of violence. 529 U.S. 362 at 368-9. Second, the *Williams* case was governed by the 1996 amendments to the habeas corpus statute that forbid the granting of relief unless the state court judgment was contrary to or an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984). This is a pre-AEDPA case and thus the review standard is *de novo*.

could cope well in a structured environment, but when it compared the evidence with Williams' extensive criminal history, concluded there was no reasonable probability that the sentencing decision would have been different. *Id.* at 371-2

The Court found this judgment not only to be a mistaken application of *Strickland v. Washington*, but also to be an objectively unreasonable one. First, the panel demanded that Williams show the outcome of his sentencing proceeding *would* have been different, a standard *Strickland* expressly rejected. Second, the decision was unreasonable because it failed to evaluate the totality of the mitigating evidence in the record against the aggravating evidence. *Id.* at 397-8.

The panel decision here is similarly sharply at odds with *Williams*. First, the panel, like the state supreme court in *Williams*, never evaluated *all* of the mitigating evidence in this record against the aggravating evidence. Second, as the mitigating evidence in this record is very similar in quantity and character with that in *Williams*, and as the aggravating evidence in *Williams* was vastly greater than the evidence here, proper application of *Williams* requires affirmance of the district court's grant of habeas relief. The court below, however, considered the mitigation evidence in the record by separating it into categories, and then asking whether each type of evidence, in isolation from the other, was sufficient to raise a reasonable possibility that the jury would not have returned the death penalty. *See* App A at 37-41. It characterized the psychological evidence from Dr. Pina – who thoroughly documented a long list of neurological and psychological problems in addition to a history of several significant childhood traumas of a deeply scarring nature – as only "possibly mitigating," and concluded this evidence does not satisfy *Strickland's* prejudice prong. *Id.*, at 39. It next briefly summarized the family dysfunction evidence from Mr. Banks' parents and again concluded the evidence, by itself, did not establish

Strickland prejudice. *Id.*, at 40. At no time did the panel consider *all* of the evidence together in addressing the question of whether counsel's uncontested deficient performance raised a reasonable probability of a different sentencing decision. This is plain error under *Williams*.

When all of the record evidence is considered, Mr. Banks' mitigation case is indistinguishable from the one the *Williams* Court found sufficient to warrant habeas relief. Mr. Banks, at the time of his trial, was a man of limited intellectual functioning; he had clearly defined neurological deficits and organic injury that significantly impaired his memory and ability to plan or deal with changing events. RES's RE at Tab 15 p. 3-4. Moreover, he had endured a number of deeply traumatic events in his childhood, and, through no fault of his own, was highly allergic to many substances, and these allergies caused severe skin disfigurement. He was shunned and ridiculed by his peers throughout his life. Furthermore, his father was chronically abusive and alcoholic and regularly beat and terrorized Mr. Banks, his mother and siblings. RES's RE at Tab 7 p. 1-5 &Tab 15 p. 4-5. Nevertheless, Mr. Banks was a very good candidate for peaceful adjustment to the prison structured environment. RES's RE at Tab 15 p. 7. As the *Williams* opinion makes clear, this type of sentencing portrait, which Mr. Banks' jury never heard and the state never rebutted, is precisely the type of evidence that can persuade a jury to reject imposition of a capital sentence.

Indeed, in *Williams*, the Court held that such evidence is significantly mitigating, so much so that even strong aggravating evidence does not defeat a *Strickland* claim. The amount and character of aggravating evidence in *Willliams* is staggering in comparison with the evidence in this record. While Mr. Banks had no prior criminal record, Williams had two prior felony convictions, one for armed robbery and, shortly before committing the murder of the elderly

victim in the capital prosecution, had severely beaten an elderly woman leaving her in a vegetative stage. 529 U.S. 362 at 368-9. Yet all of this aggravating evidence was not sufficient to persuade this Court that the mitigating evidence the jury never heard would not have raised a reasonable probability of a different sentencing result.[16]

The Panel Opinion Denying A Certificate of Appealability On Whether Fed. R. Civ. P. 15(b) Applies To Evidentiary Hearings In Habeas Proceedings Is Sharply Inconsistent with Governing Law

Mr. Banks is entitled to a certificate of appealability and to review of his meritorious claim concerning the state's suppression at trial of the lengthy pretrial statement authorities took from key witness Charles Cook that contains a comprehensive array of impeachment evidence. The district court refused to review the claim pursuant to Fed. R. Civ. P. 15(b), and the panel denied issuance of the certificate because Mr. Banks failed to show that an evidentiary hearing is the functional equivalent of a trial for Rule 15(b) purposes. This decision is entirely inconsistent with case law that shows not only that this is a debatable point, but that 15(b) applies to habeas cases.

Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts provides that "the Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to petitions filed under these rules." The Court has long applied a functional approach in determining which rules of civil procedure apply in the habeas context. *See McFarland v. Scott*, 512 U.S. 849, 866 n.2 (1994)(Thomas, J., dissenting)("The Federal Rules of Civil Procedure apply in the context of habeas suits to the

[16] The panel opinion is incompatible with other court of appeals decisions where the mitigating evidence not presented before the jury was similar as here. *See e.g., Carter v. Bell*, 218 F.3d 581 (6th Cir. 2000)(neglectful and abusive childhood, mental deficits and low intellectual functioning established *Strickland* prejudice); *Lockett v. Anderson*, 230 F.3d 695 (5th Cir. 2000)(troubled childhood and head injuries sufficient to show *Strickland* prejudice).

extent that they are not inconsistent with the Habeas Corpus statute."). Thus, the Court has held that while the broad discovery provisions of the rules of civil procedure do not apply because Rule 6 of the Rules Governing Section 2254 Cases limits discovery "to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise," *see Harris v. Nelson*, 394 U.S. 286 (1969), Rules 52(b) and 59, which govern motions to reconsider, do apply as there is "no reason to hold to the contrary." *Browder v. Director, Illinois Department of Corrections*, 434 U.S. 257, 270 (1978).[17]

With regard to Rule 15(b) and habeas corpus proceedings, the Court has sent strong signals that the rule applies to habeas corpus proceedings without qualification. *See generally Calderon v. Ashmus*, 523 U.S. 740, 750 (1998)(Breyer, J., concurring)(pre-AEDPA habeas regime consistent with Rule 15 amendment standard). Indeed, the Court has previously assumed that Rule 15(b) applies to habeas proceedings. In *Harris v. Nelson*, 394 U.S. 286, 294 n.5 (1969), the Court referenced the rule as one of a number of "noncontroversial rules" that the federal courts have applied in habeas proceedings. More recently, in *Withrow v. Williams*, 507 U.S. 680 (1993), the Court again made the same assumption. There, a prisoner had filed a one-claim petition alleging that his custodial statements were taken in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). The district court agreed, found that statements taken prior to the administration of *Miranda* warnings should have been suppressed and ordered a new trial. In addition, the court determined that statements taken *after* the administration of the warnings were involuntary. The

[17] The *Browder* Court determined that no other federal statute addressed the issue of timeliness of motions to reconsider the grant or denial of habeas decisions and that habeas practice did not differ from other civil proceedings in this regard. Moreover, the goal of Rules 52(b) and 59 in the civil context – just and speedy adjudication – is entirely consistent with the swift determination of habeas corpus claims. *See* 434 U.S. at 270-71.

warden argued that this second ruling was improper because Williams had not raised the involuntariness claim in either the state courts or in his habeas corpus petition. Williams argued that while he had not pleaded the due process claim in his federal petition, the matter was tried by implied consent of the parties. The Court assumed Rule 15(b) applied to habeas proceedings, but reversed the lower court's grant of relief on the due process ground because the record "reveals neither thought, word, nor deed of [the Warden] that could be taken as any sort of consent to the determination of an independent due process claim, and [the Warden] was manifestly prejudiced by the District Court's failure to afford her an opportunity to present evidence bearing on the claim's resolution." 507 U.S. at 696.

This line of authority suggests strongly that Rule 15(b)'s application to habeas corpus evidentiary hearings is, at the very least, one that "jurists of reason would find debatable." Moreover, it further suggests that jurists of reason would conclude that the *Withrow* Court's assumption -- that Rule 15(b) governs the question of whether an issue was or wasn't adjudicated by implied or express consent – is correct, as habeas evidentiary hearings are conducted similarly to civil trials. And unlike the discovery context, where civil and habeas practice is decidedly different, there is no reason to treat the litigation by consent of a claim not specifically pleaded in a civil trial differently from a claim not so raised in a habeas petition.

In this capital proceeding, some court should review the lawfulness of the state's suppression of a transcript revealing that the state's key witness was unworthy of belief. The record unambiguously shows that the state suppressed this document from the time of trial until, nearly 19 years later, the Magistrate Judge ordered it disclosed. The circumstances of its suppression were fully litigated below, *after* the Director had ample notice that Mr. Banks'

pleaded *Brady* claim included this issue. Certiorari is appropriate to confirm what the Court has strongly intimated in *Harris* and *Withrow* – that Rule 15(b) applies to habeas proceedings.

The Panel's Holding That Mr. Banks' *Swain* Claim Is Defaulted Conflicts With Established Law

The panel below refused to issue a Certificate of Appealability to address Mr. Banks' meritorious *Swain* claim, because it determined that jurists of reason would not find debatable whether the failure of trial counsel to object defaulted the claim, or whether Mr. Banks could establish sufficient "prejudice" to excuse the default. Both ruling are in sharp conflict with governing law.

a. **No Firm Rule Required *Swain* Objection at Trial**

The Court has made clear that in order to constitute an adequate and independent ground sufficient to support a finding of procedural default, a state rule must be "firmly established and regularly followed" at the time of the alleged default. *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991), quoting *James v. Kentucky*, 466 U.S. 341, 348 (1984); *see also Johnson v. Mississippi*, 486 U.S. 578 (1988). Throughout this litigation, neither the Director nor the lower courts have identified the existence of such a rule in force and effect at the time of the alleged default – September, 1980.

If such a rule existed, the State would surely have asserted this argument when Mr. Banks first raised his *Swain* claim during his first state post-conviction proceeding in 1983. The State did no such thing, and argued instead that the claim should be denied on the merits. As the record shows, both the trial court and Court of Criminal Appeals rejected this claim on its merits, even though there had been no objection at trial. App. A at 63-64.

Indeed, when Mr. Banks again raised this claim in his 1992 state petition, the State initially made no claim of default, though it did argue that other claims were defaulted because of a failure to raise them at trial. The first assertion of default of the *Swain* claim came on appeal. Even then, the State cited no case holding a trial objection was required for *Swain* claims in 1980.

After the 1993 evidentiary hearing on this claim that had been ordered by the Court of Criminal Appeals, the trial court found that (1) trial counsel had not raised an objection during the trial proceedings, and (2) this failure constituted a default. App. E at 2-4. But the sole authority cited for this rule was *Matthews v. State*, 768 S.W.2d 731 (Tex. Crim. App. 1989), a case decided nine years *after* Mr. Banks' trial holding (for the first time) that claims based upon *Batson v. Kentucky*, 476 U.S. 79 (1986) would be treated as defaulted in the absence of a trial objection. It relied upon no case pre-dating Mr. Banks' trial placing trial counsel on notice that a *Swain* claim would be defaulted if not raised at trial. When the Court of Criminal Appeals adopted the trial court's decision, it identified no case setting forth a firm default rule applicable in 1980. App. D.

The district court denied relief, in part, because of the absence of a trial court objection, but, like the state courts, identified no case that placed Mr. Banks on notice that a *Swain* claim must be asserted at trial or lost. See App. C at 35. And in the court below, the Director did no better. He conceded that the one state decision that was available at the time of trial, *Chambers v. State*, 568 S.W.2d 313 (Tex. Crim. App. 1978), did *not* set forth a clear trial default rule for *Swain* claims, and that the Court of Criminal Appeals did not clarify the status of such a rule until *Williams v. State*, 773 S.W.2d 525 (Tex. Crim. App. 1988), well *after* Mr. Banks' trial. *See* Director's Reply Br. at 59-60. The case upon which Mr. Banks relies – *Ex Parte Haliburton*, 755 S.W.2d 131 (Tex. Crim. App. 1988) – cannot be written off as an "occasional act of grace."

Rather, it confirms that the absence of a trial objection in 1980 did not bar merits review of a *Swain* claim in later post-conviction proceedings. Haliburton's trial, like Mr. Banks', took place in 1980, and his counsel made no *Swain* objection at trial. He was allowed to be heard on his *Swain* claim in his third state post-conviction proceeding because the absence of a trial objection did not bar the claim from being litigated in the later proceeding.

The Fifth Circuit's decision lacks the fundamental ingredient to sustain the state court's default holding: a clearly established rule that the failure to make a trial objection would bar later review of a *Swain* claim. *Ford v. Georgia, supra.*

b. The Panel's "Prejudice" Determination is Also Erroneous

While the panel determined that Mr. Banks showed adequate "cause" to overcome trial counsel's default, it held that, for COA purposes, "Banks has failed to show prejudice sufficient to overcome the bar. In light of the state court's findings of a prima facie *Swain* violation, the State proved that, for Banks' trial, no black venire member was excluded because of his or her race." App. A at 74.

This ruling relies entirely upon the state court decision that the prosecution had sufficiently overcome the prima facie case. But that ruling was fundamentally flawed because it refused to consider much of the evidence Mr. Banks introduced to demonstrate that a firmly established policy of excluding black jurors from jury service – and not a careful evaluation during voir dire – motivated the removal of the four black jurors in this case.

Mr. Banks' evidence looked at jury striking behavior from January, 1975 through September, 1980. This evidence showed that in seventeen felony cases tried in 1979 and 1980, 524 jurors qualified to serve. Pet. Tab K. Of this number, the race of 494 were identified. Blacks

accounted for 84 of these jurors; prosecutors removed peremptorily 76 of them. *Id.* Of a total of 204 jurors who actually served on juries, only 6 were black. In fifteen of the seventeen juries, the jury was either all-white or contained only one black juror. *Id.*

Data from 1975 through 1978 showed nearly *identical* rates of exclusion of blacks. While 84 African Americans made up 13% of the pre-peremptory pool, 79, or 94% ,were peremptorily struck by the State. Pet. RE Tab L. Of the 204 jurors who sat on juries, only five were black. *Id.* This evidence shows a stark pattern and practice that resulted in more than 9 out of every 10 qualified blacks peremptorily struck.

All of this evidence was plainly relevant to Mr. Banks' *Swain* challenge. *Swain* itself requires a showing of purposeful removal over a significant period of time. And because establishment of a particularly stark practice of discrimination strengthens the inference of intent, *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977); *Washington v. Davis*, 426 U.S. 229, 241-42 (1976), it is relevant when assessing whether the justifications for the strikes are race-neutral or pretextual.

The state court refused to consider *all* of Mr. Banks' evidence from 1975 through 1978 because "no State action was taken against Mr. Banks by the Bowie County District Attorney's Office under Mr. Cooksey," the District Attorney at the time. App. E at 4. The Court seemed to reason that because there was a change in the District Attorney in 1979, the evidence from before that time was not relevant.

The evidence Mr. Banks presented shows a seamless pattern of purposeful exclusion from 1975 though Mr. Banks' 1980 trial. Throughout, the prosecutors accepted more than 80% of the qualified white jurors and struck more than 90% of the black jurors. Race-coding of juror forms

was practiced throughout the time period. And the record from 1979 through Mr. Banks' trial of the surviving prosecutor who tried Mr. Banks clearly shows adherence to the policy to remove black jurors. He participated in two trials prior to Mr. Banks' case, and although thirteen black jurors were in the pre-peremptory strike pool in those cases and Mr. Banks' case, *none* of those jurors served; *each* was removed by the State's peremptory strike, and each of the three juries was all-white. SHTr.3 at 894-95, 912. Moreover, the prosecutor had observed the seating of six additional juries prior to Mr. Banks' trial. In those cases, prosecutors struck a total of 23 of 27 Black jurors in the pre-peremptory pools. *Id.* at 915. Even Elliott agreed that the total numbers of jurors who served in those nine trials–127 white jurors and only 3 Black jurors–was a "striking disparity." *Id.* at 916.

The refusal of the state court to consider much of Mr. Banks' pattern and practice evidence – both in determining the strength of his prima facie case, and also when considering the legitimacy of the reasons provided by the State justifying removal of the four black jurors in this case – is a clear mistake of law. *Arlington Heights*; *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08 (1977). Such evidence is relevant and uniquely probative of motivation. Indeed, the Court has before it in *Miller-el v. Cockrell*, No. 01-7662, the related question of the role of pattern and practice evidence in the

v. Kentucky, 476 U.S. 79 (1986) context. At the very least, the role of pattern and practice evidence in the determination of justifications for strikes is an issue that jurists of reason would find debatable. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Thus, certiorari is warranted because the Fifth Circuit's ruling that Mr. Banks' meritorious *Swain* claim is defaulted is contrary to this Court's jurisprudence.

CONCLUSION

Wherefore, for the foregoing reasons, Mr. Banks respectfully moves the Court to grant review of this matter.

Respectfully submitted,

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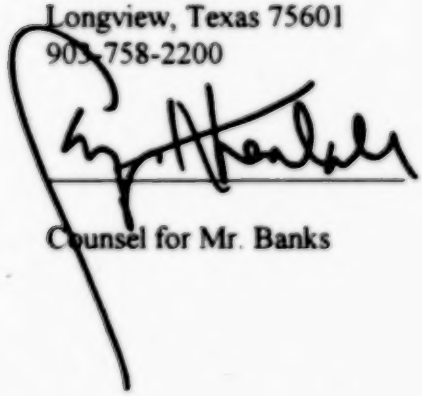

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